

Service Date: April 27, 1999

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

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IN THE MATTER of the Investigation of	)	UTILITY DIVISION
Wilder Resorts, Inc., d/b/a Fairmont Hot Springs	)	
Resort, Compliance with Public Utility Obligation	)	DOCKET NO. D99.4.86
To File Tariffs for Water Service to its Customers	)	ORDER NO. 6162

**ORDER COMPELLING COMPLIANCE**  
**WITH TITLE 69, CHAPTER 3, MCA**

Background

1. In March and April 1997, Robin Baker, formerly the Compliance Specialist for the Montana Public Service Commission (Commission), received complaints from residents near Anaconda, Montana, indicating that the resort at Fairmont Hot Springs charged them for water service, while providing water service to other residents at no cost. Ms. Baker determined that Fairmont Hot Springs had not filed tariffs with the Commission to provide public utility water service. In a telephone discussion, Ed Henrich, General Manager for Fairmont Hot Springs, told her that the resort had an agreement with most of the residents to provide water service at no cost, but it did not have the same agreement with the complaining residents. Fairmont Hot Springs was incorporated as Wilder Resorts, Inc. (generally referred to as "Fairmont").

2. On April 4, 1997, the Commission obtained a copy of the Articles of Incorporation of Wilder Resorts, Inc., from the office of the Secretary of State, filed March 21, 1990. Purposes of the corporation in Article III included (a) to conduct, operate and maintain leasehold timeshare condominium units; (b) to provide all types of services, facilities and improvements to owners of condominiums at the resort; and (c) to purchase, lease, construct, contract for, develop or otherwise acquire such property necessary to carry out the purposes of the corporation.

3. By letter dated April 25, 1997, on the Commission's investigation of Wilder Resorts, Inc., Ms. Baker informed Mr. Henrich of the Commission's jurisdiction over rates charged and services provided by privately owned water and/or sewer companies pursuant to §§ 69-3-101 and

69-3-102, Montana Code Annotated (MCA). Her letter outlined the filing requirements for establishing a private water and sewer utility. Fairmont was required to file a petition requesting approval of initial rates; cost justification for the rates; a balance sheet; a description of the utility facilities; a statement by the company that it adopts the rules and regulations of the Commission; an annual report after the first year of operation; and payment of tariff filing fees computed at the rate of \$5.00 per tariff pages.

4. Mr. Henrich replied on behalf of Fairmont by letter dated May 22, 1997, maintaining that Fairmont is not a private water and sewer company. He stated that Fairmont provides water to parties who agreed to compensate Fairmont as arranged in the division of assets in 1988. He enclosed a copy of part of the Partition Agreement signed and executed by First Security Bank of Anaconda (FSB) and Jackson County Federal Savings & Loan Association (JCF) on September 8, 1988. The Table of Contents indicated that there were deeded timeshare interests and leased timeshare interests, with separate operation of the timeshare and the resort. Certain real property was to be quit-claimed.

5. The only portion of the agreement included in total was entitled "8. Utilities." FSB relinquished all rights and title to JCF in the water rights and all rights to the well. Each party granted easements to the other for use of water or sewer lines, pipes, pumps, connectors, valves or facilities used to provide water or sewer service to the other's properties, which became the sole property of the grantor. JCF agreed to make potable water and sewer services available at cost to the Deeded Timeshare Real Properties and Campground Real Properties. The term "at cost" meant the reasonable cost of providing the water and a charge for necessary capital improvements. Parties agreed to provide future easements as necessary for construction of utility facilities.

6. Mr. Henrich attached to his May 22, 1997, letter a copy of what was alleged to be part of an agreement between Mr. Swindle and Fairmont, related to Fairmont Chalets Property. Mr. Henrich stated: "No other user of the water and sewer facilities has filed a complaint nor are they dissatisfied with the agreement." He informed the Commission that Mr. Swindle's recourse is to live up to the agreement to pay for water service.

7. By letter dated June 11, 1997, the Commission staff attorney informed Mr. Henrich that Fairmont was providing public utility service without meeting the legal requirements of the

Commission. Partitioning parties own their own property and are responsible for the expense for repair and sewer pipes and equipment on their own property, consistent with the obligations of a property owner for the water facilities on its one property. "JCF" agreed to make potable water available at reasonable cost to another entity, including a proportional share for capital improvements, consistent with a public utility obligation. The articles of incorporation indicated that the purposes were to provide necessary services, which includes water and sewer facilities. The Commission staff's opinion letter concluded that Fairmont constructed, maintained and operated water and sewer facilities and had been providing utility service, albeit illegally charging rates without the approval of the Commission. It also appeared from representations by Mr. Henrich that Fairmont charged some for utility service, while not charging others.

8. The Commission received a letter dated June 18, 1997 from legal counsel for Fairmont, with an offer to meet and discuss the concern of Fairmont not to become classified as a public utility. ". . . we have historically provided water to many users over the years, particularly individual homeowners who have purchased property along our water and sewer distribution system [primarily "upstream"]. We have never charged a fee to these homeowners." The letter indicated that "downstream users" had made arrangements for payment of these services.

9. Finally, on October 17, 1997, Fairmont representative Mr. Henrich and Fairmont's legal counsel met with two staff members of the Commission, with Mr. Swindle observing. The Commission staff received a tour of the areas on which the water utility facilities are located. On this 500 acres there are single family lots and condominium units individually purchased and owned under individual deeds by individuals other than the resort itself. The whole resort area was originally built by the partnership of FSB and JCF, which was dissolved by the partition agreement in 1988. After the tour, staff informed the Fairmont contingency that Fairmont was providing a public utility service and apparently discriminating against some of the consumers by charging fees while not charging other consumers. Staff stated that it would advise the Commission that Fairmont would explore options before coming in and complying with the law. Options could include transferring the facilities to a water users association or participating in setting up a water district.

10. On February 27, 1998, the Commission staff attorney wrote Fairmont, advising that it must respond before March 13, 1998 on what avenue it would pursue. The staff suggested the

name of a knowledgeable accountant in water utility cases before the Commission. Again, the Commission repeated that it is not onerous to be a public utility. In fact, the benefits can include guaranteed rates to cover the costs of providing the service. Fairmont's legal counsel responded that he needed more time to respond in a letter dated March 5, 1998. On June 25, 1998, the Commission staff sent a letter stressing the fact that it was time for Fairmont to come into compliance with public utility regulation.

11. In its letter dated June 29, 1998, Fairmont's legal counsel stated that he had discussed the situation at Fairmont with its General Manager, Mr. Henrich, who posed the following question: **"Would Wilder Resorts, Inc., d/b/a Fairmont Hot Springs Resorts, have any problem at all if it did not charge any users any fees for the water services that have been provided in the past?"** The counsel asserted that Fairmont only charged the two commercial users, but had been providing water service free of charge to the homeowners who had purchased land in the development area. He postulated that if Fairmont provided free water service to everyone on its distribution system, then "any question of being a public utility should be moot."

12. On August 6, 1998, the Commission staff informed Fairmont's legal counsel that Fairmont would still be a public utility pursuant to the definition in § 69-3-101, MCA, as a separate entity providing public water service to the privately owned homes and condominiums and to others. Under § 69-3-201, MCA, public utilities are required to provide reasonably adequate service and facilities at reasonable rates that are non-discriminatory.

13. On April 1, 1999, Mr. Swindle forwarded to the Commission a copy of a statement from Fairmont Hot Springs which appeared to be a hotel bill (Arrival April 24, 1997; Departure February 03, 1999), month by month, totaling \$5,400. The statement never mentioned water services, but Mr. Swindle informed the Commission that the statement could have no other intent, as he was not a guest of the hotel for that period of time.

14. On April 2, 1999, the new owner of Fairmont RV Park contacted the Commission about bills it received for water service. Enclosed with the RV Park's letter to the Chairman of the Commission received April 8, 1999, was documentation that Fairmont was providing and charging for water service. The RV Park's manager noted in the letter that Fairmont was not authorized by the Commission to charge for water service. Although the RV Park did not object

to paying for water service, it maintained that being charged while other consumers did not have to pay for water service was discriminatory treatment.

15. At its work session on April 6, 1999, the Commission determined that it had given Fairmont enough opportunity to come into compliance through informal avenues. The Commission on its own motion acted to issue a directive to Fairmont to come into compliance with the statutes and rules governing public utility regulation.

#### Findings of Fact

16. Based on the history of water service provided by Fairmont Hot Springs near Anaconda, Montana, to members of the public, the Commission finds that Fairmont has operated as a public utility that should be subject to the regulation of rates and service by the Commission. Fairmont is a separate, privately owned enterprise that has provided water service to all the privately owned residences and some commercial establishments from its distribution system.

17. The Commission finds that Fairmont has not complied with Title 69, Chapter 3, MCA; in fact, Fairmont is clearly on the record with multiple efforts over a two-year period to avoid compliance with the requirements of the Commission. The Commission has advised Fairmont how to file an application for approval of initial tariffs and what to submit for cost information to demonstrate whether the proposed rates are just and reasonable and non-discriminatory. The Staff has made every effort to assist Fairmont in the regulatory process. The staff informed Fairmont that regulation would be even-handed and would offer benefits to the utility, which would include recovery of its expenses, including depreciation, and a reasonable return on investment.

18. Fairmont may be concerned about agreements entered into with purchasers on the sale of properties in its development. The Commission finds that the agreements cannot override, circumvent or void the public utility obligation to come before the Commission and obtain approval to charge reasonable rates for utility service. Similar developments throughout the state of Montana have had to comply with public utility regulation and submit to the Commission's jurisdiction over rates and service. The Commission finds that it is time for Fairmont to fulfill the legal requirements in order to provide public utility service and charge any consumer.

19. The Commission will not deprive Fairmont of any legal right to present arguments that the agreements to provide service to the purchasers in its development are unique or remove

Fairmont from the definition of a public utility for its service to these non-paying consumers. However, the Commission finds that Fairmont, by its own admission, has been providing public utility service to some consumers and charging them rates which were not legally approved by the Commission. The Commission finds that there is no legal basis to assess these charges, without the approval of the Commission to charge utility rates to these customers, whether or not there was an agreement between the customer and Fairmont.

#### Conclusions of Law

1. For purposes of this Docket, pursuant to § 69-3-101, MCA, the term "public utility" includes every entity that owns, operates, or controls any facilities and any water right within the state for the delivery of water to other persons, firms, associations, or corporations, private or municipal. As a matter of law, Fairmont owns, operates and controls facilities and water rights for the purpose of delivering water to others, and thereby is a public utility.

2. The Montana Public Service Commission is invested with full power of supervision and regulation of public utilities, subject to the provisions of Title 69, Chapter 3, MCA. The Commission has the general powers to do all things necessary and convenient in the exercise of the powers conferred on the Commission by statute, including regulating the mode and manner of all investigations and hearings of public utilities and other parties before it. §§ 69-3-102 and 69-3-103, MCA.

3. The Commission has (a) the authority to inquire into the management of the business of all public utilities, (b) the duty to keep itself informed as to how the utility business is conducted, and (c) the right to obtain from any public utility all necessary information to enable the Commission to perform its duties. § 69-3-106, MCA.

4. The Commission has the duty to inquire into any neglect or violation of the laws of this state by any public utility, as defined by § 69-3-101, MCA, doing business in this state or by the officers, agent or employees of the public utility, and to enforce the public utility obligations. § 69-3-110, MCA. The Commission may on its own motion initiate an investigation into any of the the rates, tolls, charges, rules, practices and services, and after a full hearing, may order such changes as may be just and reasonable. § 69-3-324, MCA.

5. Public utilities have the duty to furnish reasonably adequate service and facilities at just and reasonable rates. The charge made by any public utility for water delivered or furnished

to another must be reasonable and just, and every unjust and unreasonable charge is prohibited and unlawful. § 69-3-201, MCA.

6. If any public utility violates any provision of Title 69, Chapter 3, MCA, does any act prohibited in the chapter, fails or refuses to perform any duty enjoined on the utility, fails to place in operation any rate, or fails, neglects, or refuses to obey any lawful requirement or order made by the Commission, then the public utility may be subject to penalties prescribed by § 69-3-206, MCA. § 69-3-209, MCA. As a matter of law, the Commission will follow the legal requirements to determine whether there is a violation of public utility laws or orders, as required by Title 69, Chapter, 3, MCA.

7. Every public utility has an obligation to file schedules with the Commission showing all rates, tolls and charges that it intends to establish and put in force for the utility service it provides. Every public utility must file with these schedules of its rates and charges all rules that in any way affect the rates to be charged for any service. A copy of the schedules must be kept on file in every station or office of the public utility where consumers or users may make payments, in a readily accessible form and place for the public. § 69-3-301, MCA. The rates, tolls and charges in the printed schedules alone are the lawful rates for public utility service. It is illegal for a public utility to deviate from the rates or to charge discriminatory rates. The Commission may order refunds or credits of rates, tolls, or charges collected in violation of Section 69, MCA, and may order payment of interest at a reasonable rate on the refunded amount.

#### COMMISSION DECISION AND ORDER

WHEREFORE, THE COMMISSION RENDERS THE FOLLOWING ORDER:

1. Wilder Resorts, Inc., d/b/a Fairmont Hot Springs Resort (Fairmont), shall come into compliance with public utility law as set forth in Title 69, Chapter 3, MCA.
2. Fairmont shall submit the information on its public utility operations as outlined in the various correspondence from the Commission throughout the past two years, including the rates it intends to charge and the cost-justification for those rates. Fairmont shall cooperate with the Commission staff in developing the necessary information to support the rates and charges.
3. Fairmont must file its initial application with the Commission for approval of rates and charges for all the consumers of public utility water service on or before May 28, 1999.
4. Any rates and charges to customers before the approval of the proposed tariffed rates and

schedules are deemed *prima facie* illegal and void. Fairmont shall rebate any payments made pursuant to these illegal charges and shall remove any charges made to a consumer that may be unpaid before the Commission's approval of lawful rates, charges and service rules. If Fairmont satisfies the Commission that it has complied with this requirement on or before May 28, 1999, the Commission will not require Fairmont to pay interest on these illegally collected charges.

DONE AND DATED this 6th day of April, 1999, by a vote of 5 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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DAVE FISHER, Chairman

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NANCY MCCAFFREE, Vice Chair

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BOB ANDERSON, Commissioner

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GARY FELAND, Commissioner

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BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson  
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.